

**CERTIFIED FOR PARTIAL PUBLICATION\***  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FOURTH APPELLATE DISTRICT**  
**DIVISION TWO**

ANAND L. DANIELL,

Plaintiff and Appellant,

v.

RIVERSIDE PARTNERS I, L.P. et al.,

Defendants and Respondents.

E052072

(Super.Ct.No. RIC520405)

**OPINION**

APPEAL from the Superior Court of Riverside County. Mark E. Johnson and Ronald L. Taylor (retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const), Judges.† Affirmed.

Anand L. Daniell, in pro. per., for Plaintiff and Appellant.

Larry Rothman & Associates and Larry Rothman; Calder & Mello and Kevin H. Mello for Defendants and Respondents.

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\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.C, II.D and III.

† Judge Johnson granted the motion for relief from default (see part III, *post*) and the special motions to strike (see part II, *post*), and entered the judgment in favor of two of the respondents. Judge Taylor entered the judgment in favor of the third respondent.

Anand L. Daniell filed this action for malicious prosecution based on an unlawful detainer allegedly filed against him by the previous owner of his apartment complex and by the previous property manager. The defendants in this action include the alleged *current* owners and *current* property manager, who Daniell claims are liable as successors in interest.

The current owners and the current property manager brought special motions to strike (SLAPP motions) under Code of Civil Procedure section 425.16 (the SLAPP Act). The trial court granted the motions. It ruled that Daniell's cause of action arose out of the moving parties' exercise of their First Amendment rights, *even though* they did not prosecute the unlawful detainer. Moreover, it ruled that Daniell had failed to show a probability of prevailing against them, precisely *because* they did not prosecute the unlawful detainer.

Daniell appeals. He contends that the trial court erred by granting the SLAPP motions, because:

1. His malicious prosecution cause of action does not arise out of any protected activity by the current owners or the current property manager.
2. He showed a probability of prevailing on the merits, in that:
  - a. With respect to the previous owner and the previous property manager, he introduced evidence of malice, lack of probable cause, and favorable termination.

b. He also introduced evidence that the current owners and the current property manager are liable as the successors in interest to the previous owner and the previous property manager.

In the published portion of this opinion, we will uphold the rulings granting the SLAPP motions, essentially for the reasons stated by the trial court. First, Daniell’s malicious prosecution claim is “[a] cause of action against *a person* arising from any act of *that person* in furtherance of *the person’s* right of petition or free speech” (Code Civ. Proc., § 425.16, subd. (b)(1), italics added), even though these particular defendants did not prosecute the underlying unlawful detainer. Second, Daniell failed to show that these defendants could be held liable on a successor-in-interest theory.

In the unpublished portions of this opinion, we will reject Daniell’s contention that the current property manager’s SLAPP motion was never served on him. We will also reject his contention that the trial court erred by granting the current property manager’s motion for relief from default.

Hence, we will affirm.

## I.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The Complaint.*

In March 2009, Daniell filed this action for malicious prosecution against Riverside Partners I, L.P. (Riverside), Kayne Anderson Real Estate Partners I (Kayne) and Campus Apartments, L.L.C. (Campus) (collectively respondents), among others.

B. *The First SLAPP Motion.*

In May 2010, Riverside and Kayne filed a SLAPP motion (first SLAPP motion). They argued, among other things, that filing an unlawful detainer is constitutionally protected speech or petition activity and that Daniell could not show a probability of prevailing against them because they did not acquire his apartment complex until after the unlawful detainer had already been filed and dismissed.

The following facts were either shown by the evidence introduced in connection with the first SLAPP motion<sup>1</sup> or (when specifically noted below) alleged in Daniell's complaint.

In 2005, Daniell leased an apartment in a complex on Iowa Avenue in Riverside. At the time, the complex was owned by an entity called GrandMarc<sup>2</sup> and managed by College Park Management, LLC (College Park).

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<sup>1</sup> In opposition, Daniell submitted his own declaration, along with numerous exhibits. In the declaration, however, he purported to draw various speculative inferences and legal conclusions about matters of which he could not possibly have had personal knowledge. Such testimony simply does not constitute substantial evidence. (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1144 [speculation]; *WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, 532, fn. 3 [legal conclusions].) Accordingly, even though there was no objection to it, we cannot consider it.

<sup>2</sup> According to the lease, the name of the lessor was GrandMarc UCR, LLC. Thus, the unlawful detainer was filed in the name of GrandMarc UCR, LLC. According to Daniell, however, GrandMarc UCR, LLC had been dissolved; the true owner of the property was GrandMarc UCR, LP. Indeed, he argues that this is one of several reasons why the unlawful detainer lacked probable cause. For purposes of this opinion, however, we can safely ignore any distinctions between the various GrandMarc entities.

In 2007, GrandMarc filed an unlawful detainer against Daniell. According to Daniell's complaint, the unlawful detainer was also filed "on behalf of" College Park. The unlawful detainer was retaliatory — it was filed in response to Daniell's complaints about the habitability of the complex. It was utterly meritless, and it caused damages to Daniell.

In response to the unlawful detainer, Daniell filed a demurrer and a motion to strike. Before they were even heard, the unlawful detainer was voluntarily dismissed. The attorneys who had filed it supposedly later admitted that they had dismissed it because it was meritless.

In 2008, Riverside purchased the apartment complex, assuming GrandMarc's loan. According to the complaint, Kayne is a general partner in Riverside and a co-owner of the complex. The complaint alleges that Daniell is suing Riverside and Kayne as GrandMarc's successors in interest, and he is suing Campus as College Park's successor in interest.

C. *Campus's Motion for Relief from Default.*

Meanwhile, in June 2010, because Campus had not filed a timely answer or demurrer (or SLAPP motion), the trial court entered its default. In July 2010, Campus filed a motion to vacate the default.

D. *The Trial Court's Rulings.*

In September 2010, the trial court granted Campus's motion to vacate. At the same hearing, it also granted the first SLAPP motion.<sup>3</sup>

E. *The Second SLAPP Motion.*

Meanwhile, in September 2010, Campus filed its own SLAPP motion (the second SLAPP motion). However, it was essentially identical to the first SLAPP motion. In November 2010, the trial court granted this motion.

II.

THE SLAPP MOTIONS

Daniell contends that the trial court erred by granting the SLAPP motions.

A. *Legal Background.*

The SLAPP Act states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).)

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<sup>3</sup> The first SLAPP motion had also filed on behalf of defendant Nadiyah Zarifa Shelton. The trial court denied the first SLAPP motion with respect to Shelton. Shelton is not a party to this appeal, and we are not called upon to review this ruling.

“The analysis of [a SLAPP] motion thus involves two steps. ‘First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one “arising from” protected activity. [Citation.] If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.]” (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820.)

“We review an order granting or denying a motion to strike under section 425.16 de novo. [Citation.]” (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.)

B. *A Cause of Action Arising from Protected Activity.*

For purposes of the SLAPP Act, “every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding. [Citation.]” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 215.)

Daniell points out, however, that the underlying unlawful detainer was filed by GrandMarc and College Park; he is suing respondents as their successors in interest. Thus, he contends that his malicious prosecution cause of action does not arise out of any protected activity *by respondents*.

The SLAPP Act, by its terms, applies to “[a] cause of action against *a person* arising from any act of *that person* in furtherance of *the person’s* right of petition or free speech . . . .” (Italics added.) (Code Civ. Proc., § 425.16, subd. (b)(1).) We have found very few cases construing this language.

In *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, the court stated, in dicta, that an attorney sued for acting on behalf of a client would not necessarily be “that person” within the meaning of the SLAPP Act. (*Shekhter*, at pp. 152-153.) In the case before it, however, it noted that the attorney defendants had been sued for communicating with the media and thus for exercising their own free speech rights. (*Id.* at p. 153.) It therefore declined to decide whether they could have brought a SLAPP motion if they had been sued solely for acting as counsel in litigation. (*Id.* at p. 154.)

Eventually, the Supreme Court resolved this particular issue in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048; it held that an attorney who files or prosecutes a civil action on behalf of a client is engaged in “communicative conduct” so as to qualify for protection under the SLAPP Act. (*Rusheen*, at p. 1056.) Neither *Shekhter* nor *Rusheen*, however, sheds much light on whether the successor in interest to a speaker could invoke the SLAPP Act.

The only even tangentially relevant case that we have been able to find is *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8 [Fourth Dist., Div. Two]. There, Ludwig wanted to develop a discount mall near Barstow; he encouraged other individuals to file lawsuits and to appear at public meetings to challenge plans to build a competing discount mall. As a result, the City of Barstow sued him for interference with contractual relations, interference with prospective economic advantage, and unfair competition. (*Id.* at p. 12 & fn. 3.) The trial court denied Ludwig’s SLAPP motion. (*Id.* at p. 11.)

When Ludwig filed a writ petition, Barstow argued, among other things, that he did not have standing under the SLAPP Act because he “did not, personally, perform any of the challenged acts.” (*Ludwig v. Superior Court, supra*, 37 Cal.App.4th at pp. 16-17.) We disagreed. We explained: “It is well established that a statute open to more than one construction should be construed so as to avoid anomalous or absurd results. [Citation.] We assume the same principle applies to the Constitution. A person can exercise his own rights by supporting the forceful activities of others; it would be absurd to hold that the confident opponent who takes the public podium is protected, while the shy opponent who prefers to lend moral support by standing silently in the audience is not. [¶] . . . We see no meaningful difference between a person who supports and encourages the filing of a lawsuit, and one who supports and encourages a third party to speak out publicly on a matter of public interest.” (*Id.* at p. 18.)

Barstow also argued that Ludwig was not being sued for engaging in any “communicative conduct.” (*Ludwig v. Superior Court, supra*, 37 Cal.App.4th at p. 18.) We rejected that argument, too, in part because “communicative conduct was . . . committed by [his] agents in speaking, writing, and making allegations in legal documents.” (*Id.* at p. 20.)

While *Ludwig* is not, strictly speaking, on point, it does stand for the proposition that the SLAPP Act can be invoked by someone who did not personally engage in the protected communicative conduct. More generally, it indicates that the SLAPP Act should not be given an absurd construction.

Daniell argues that the trial court disregarded the plain meaning of the statute — particularly the words, “that person.” In this context, however, “that person” is neither plain nor unambiguous. Artificial entities, such as corporations and limited partnerships, have First Amendment rights. (*Citizens United v. FEC* (2010) \_\_\_ U.S. \_\_\_ [130 S.Ct. 876, 899-900, 175 L.Ed.2d 753].) Moreover, a corporation is a “person” for purposes of the SLAPP Act. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188.) Nevertheless, artificial entities are purely legal constructs. Thus, while it may be obvious that one human being is not the same person as another, whether one artificial entity is the same “person” as another for purposes of a given statute presents a more difficult question.

To put it a different way, what differences in corporate structure should suffice to make a corporation not “that person”? A change of name? A change of stockholders? A sale of corporate assets? We believe that this question can only be answered in light of the purposes of the SLAPP Act.

In the SLAPP Act itself, the Legislature declared that “it is in the public interest to encourage continued participation in matters of public significance, and . . . this participation should not be chilled through abuse of the judicial process. *To this end, this section shall be construed broadly.*” (Code Civ. Proc., § 425.16, subd. (a), italics added.)

“The general rule of successor nonliability provides that where a corporation purchases, or otherwise acquires by transfer, the assets of another corporation, the acquiring corporation does not assume the selling corporation’s debts and liabilities.

[Citation.]” (*Fisher v. Allis-Chalmers Corp. Product Liability Trust* (2002) 95 Cal.App.4th 1182, 1198.) However, in *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, the Supreme Court noted four exceptions to this rule: When “(1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller’s debts. [Citations.]” (*Id.* at p. 28.)<sup>4</sup> For purposes of the second prong of the SLAPP analysis — the probability of prevailing on the merits — Daniell argues that respondents fall under one of these exceptions.

Under at least three of these exceptions, however, the law contemplates a continuity of identity between the predecessor and the successor. For example, under the first exception, the successor not only purchases the assets of the predecessor, but also assumes its liabilities. Thus, in some sense, it becomes the predecessor. It may not have the same stockholders, officers, or employees; but then, even a single corporation’s stockholders, officers, and employees may change over time. Similarly, under the second exception, the predecessor and the successor merge. This is the classic situation in which the predecessor and successor may be deemed the same “person.”

Under the third exception, “ . . . California decisions holding that a corporation acquiring the assets of another corporation is the latter’s mere continuation and therefore

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<sup>4</sup> The court went on to create a fifth exception, applicable solely in product liability cases. (*Ray v. Alad, supra*, 19 Cal.3d at pp. 30-34.)

liable for its debts have imposed such liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations.' [Citation.]" (*Beatrice Co. v. State Bd. of Equalization* (1993) 6 Cal.4th 767, 778.) "The extension of liability to the purchasing corporation in these circumstances is based on 'the principle that "[i]f a corporation organizes another corporation with practically *the same shareholders and directors, transfers all the assets* but does not pay all the first corporation's debts, and *continues to carry on the same business, the separate entities may be disregarded* and the new corporation held liable for the obligations of the old. [Citations.]" [Citation.]" [Citations.]" (*Phillips, Spallas & Angstadt, LLP v. Fotouhi* (2011) 197 Cal.App.4th 1132, 1139-1140, italics added, fn. omitted.)

Admittedly, the fourth exception, which presents a fraudulent conveyance scenario, is a bit different. In this instance, the law does not disregard the separate existence of the successor; rather, it disregards the conveyance. (Civ. Code, § 3439.07, subd. (a); *Mattern v. Carberry* (1960) 186 Cal.App.2d 570, 572.) Thus, the successor is liable only to the extent of the assets fraudulently conveyed. It is not necessarily subject to *all* of the predecessor's liabilities. Daniell, however, does not rely on this exception, and there is no evidence of a fraudulent conveyance in this case.

A business that wishes to exercise its First Amendment rights may be protected by the SLAPP Act; nevertheless, from that business's point of view, the knowledge that

exercising those rights could subject a later buyer of its assets to a lawsuit — and moreover, that the buyer could not invoke the SLAPP Act to obtain a prompt dismissal of the lawsuit — could have a substantial chilling effect. Protecting only the business that engages in the speech, without protecting its successors in interest, falls short of the purpose that the SLAPP Act is designed to serve.

We therefore conclude that when an entity that has acquired the assets of another entity is sued under at least the first three exceptions in *Ray v. Alad Corp.*, *supra*, 19 Cal.3d at p. 28, and when the predecessor entity could have invoked the SLAPP Act, the successor entity can invoke the SLAPP Act, too.

We focus on the fact that this case involves artificial entities, because that is all that is necessary to decide the particular case that is before us. By adopting this narrow reasoning, we do not intend to prejudge the question of whether similar principles should apply to natural persons. Certainly we do not intend to preclude this possibility. Otherwise, we express no opinion on this question.

The trial court rejected Daniell’s reasoning as “a bit too cute . . . .” It noted that, for purposes of the second prong of the SLAPP analysis, he was essentially arguing that Riverside and Kayne were the same entity as GrandMarc; however, for purposes of the first prong, he was trying to argue that they were distinct from GrandMarc. For the reasons already stated, we agree.

We therefore conclude that the trial court properly found that Daniell’s cause of action arose out of protected activity.

C. *Probability of Success on the Merits.*

The trial court ruled that Daniell failed to show a probability of prevailing on the merits because the underlying unlawful detainer was prosecuted by GrandMarc and (allegedly) by Campus, not by respondents.

Daniell contends that this was error, because he introduced evidence that respondents were liable as successors in interest under the principles discussed in part II.B, *ante*.

1. *Additional factual and procedural background.*

In support of his theory that Riverside and Kayne were liable as GrandMarc's successors in interest, Daniell showed the following.

a. *The Wang action.*

In the assumption agreement between Riverside, GrandMarc, and GrandMarc's lender, GrandMarc had represented and warranted that there were no actions pending against it. This was false, as there was at least one pending action, entitled *Wang v. GrandMarc UCR, LLP* (the *Wang* action).

GrandMarc answered the complaint in the *Wang* action under the name "950 S. GrandMarc UCR, LP." Actually, no such entity existed.

After the sale of the complex, "950 S. GrandMarc UCR, LP" filed a motion for leave to file an amended answer. The original answer had been filed by the Law Offices of Sam Chandra; this motion, however, was filed by Kinkle, Rodiger & Spriggs.

Daniell concludes that (1) GrandMarc litigated the *Wang* action under a false name to conceal the existence of that action from its lender, and (2) Riverside took over the litigation of the *Wang* action under the same false name for the same purpose.

b. *The Waddell action.*

In 2004, GrandMarc had registered the fictitious business name, “GrandMarc at University Village.”

After the sale of the complex, Riverside filed an unlawful detainer complaint against one Brittany Waddell under the name, “GrandMarc at University Village.”

Daniell concludes that Riverside and Kayne were a “mere continuation” of GrandMarc.

2. *Analysis.*

Daniell’s evidence fell short of showing any applicable exception to the general rule that the purchaser of an entity’s assets does not assume the entity’s liabilities.

First, Daniell argues that he showed an implied assumption agreement because, after the sale of the complex, Riverside took over the defense of the *Wang* action. However, there was no *evidence* of this. Both the original answer and the amended answer in the *Wang* action were filed on behalf of 950 S. GrandMarc UCR, LP. There was no evidence that Riverside had anything to do with the filing of the amended answer. The only such “evidence” consisted of Daniell’s own wholly conjectural assertion. As

already discussed,<sup>5</sup> this was not substantial evidence.<sup>6</sup> Admittedly, Kinkle, Rodiger & Spriggs replaced Sam Chandra. The record, however, showed that GrandMarc also used Kinkle, Rodiger & Spriggs in other matters. By contrast, there was no evidence that Riverside ever used Kinkle, Rodiger & Spriggs.

Second, Daniell argues that Riverside’s use of GrandMarc’s fictitious business name in the *Waddell* action showed that Riverside and Kayne were a “mere continuation” of GrandMarc. However, as already noted (part II.B, *ante*), a mere continuation theory requires a showing of inadequate consideration and/or overlapping officers, directors, or stockholders. (*Beatrice Co. v. State Bd. of Equalization, supra*, 6 Cal.4th at p. 778.) Here, there was no such evidence.

Last, but not least, we note that all of Daniell’s evidence was intended to show that *Riverside* was liable for GrandMarc’s torts. He did not introduce any similar evidence regarding either Kayne or Campus. Thus, he cannot even argue that he showed a probability of prevailing against them.

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<sup>5</sup> See footnote 1, *ante*, page 4.

<sup>6</sup> Daniell asserts that GrandMarc litigated under the name of the nonexistent “950 S. GrandMarc UCR, LP” to prevent its lender from finding out about the *Wang* action. This is similarly conjectural. More to the point, however, it appears irrelevant to whether Riverside was involved in the *Wang* action in any way.

Perhaps for this reason, Daniell asserts that it was Riverside — not GrandMarc — that made the allegedly false representation to the lender. This is flatly not true. This representation was made by GrandMarc alone.

We therefore conclude that the trial court properly found that Daniell failed to show a probability of prevailing on the merits.

D. *Notice of the Second SLAPP Motion.*

Daniell contends that the trial court erred by granting the second SLAPP motion, brought by Campus, because there was no proof that the motion was ever served on him.

1. *Additional factual and procedural background.*

When Campus filed its request for relief from default, it attached, as its proposed pleading (Code Civ. Proc., § 473, subd. (b)), the draft of a SLAPP motion.

The motion was identical to the motion previously filed by Riverside and Kayne (down to and including typographical errors), except that Campus's name was *added* as a moving party. Also, by necessity, the hearing date was left blank.

When the trial court granted the motion for relief from default, it ordered Campus to file its SLAPP motion separately. Accordingly, the following day, Campus filed the second SLAPP motion. It was identical to the first SLAPP motion, except that Riverside and Kayne's names were *deleted*.

The motion was set for hearing on October 26, 2010. However, there was no proof of service.

Daniell did not file any opposition or other response to the motion. Meanwhile, however, he appealed from the order granting the first SLAPP motion. He also filed a motion to vacate all future hearing dates, on the ground that the appeal was pending, set for hearing on October 26.

At the hearing on October 26, the trial court suggested continuing all pending motions — specifically including the “anti-SLAPP motion to strike by Campus” — to November 16.

Daniell stated: “[T]he reason I filed the appeal before [Campus’s] motion, one, *I didn’t get notice of this motion*; two, the appeal would resolve the issue . . . .” (Italics added.) He conceded that he had received the copy of the motion that was attached to Campus’s motion for relief from default. He also conceded that he “d[id]n’t have any problems” with continuing all of the motions to November 16.

One day before the scheduled hearing, Daniell filed an “ex parte application for an order denying the special motion to strike by Campus . . . .” (Capitalization and italics omitted.) In it, he argued that the motion had not been served on him. The application was supported by his own declaration, in which he testified that he had never received a copy of the motion.

At the hearing on November 16, Campus’s attorney claimed that, at the hearing on October 26, “. . . I wrote the [hearing] date down on my copy [and] handed it to the plaintiff. . . . I went and filed it and then had my office mail him a copy.”

Daniell disputed this: “. . . I wasn’t handed the document. I wasn’t handed this motion . . . .”

The trial court made a factual finding that Daniell had been properly served. It stated: “I remember us having this discussion before and [Campus’s attorney] actually handing you a copy of the motion. [¶] . . . [¶] . . . I remember . . . sitting in here and

watching the motion actually handed to you in open court.” It proceeded to grant the motion.

## 2. *Analysis.*

The trial court found that Daniell was properly served based on its own personal observations. Daniell labels the court’s recollection “unreliable”; otherwise, however, he does not explain why this was error. It was not. A trial court is entitled to make factual findings based on its own observations. (*People v. Clark* (2011) 52 Cal.4th 856, 918; *People v. Avila* (2004) 117 Cal.App.4th 771, 782.)

“ . . . ‘It is the fact that service was made, rather than the proof of service, that vests the court with jurisdiction to act. [Citations.] The jurisdiction of the court does not depend upon the preservation of the proof of service but upon the fact that service has been made. [Citations.]’” (*Call v. Los Angeles County Gen. Hosp.* (1978) 77 Cal.App.3d 911, 917.)

Separately and alternatively, the record demonstrates that Daniell had all requisite notice. As he conceded at the hearing on October 26, he had already received a copy of Campus’s motion as an attachment to its motion for relief from default. He then agreed that motion could be heard on November 16. Admittedly, the copy of the motion that he had received stated that it was made by Riverside, Kayne, and Campus, whereas the version of the motion that was actually filed stated that it was made by Campus only. However, this is a nugatory distinction. The motion by Riverside and Kayne had already

been granted; Daniell was well aware that the pending motion was brought solely by Campus.

We therefore conclude that the trial court properly found that Daniell had notice of the second SLAPP motion.

### III.

#### CAMPUS'S MOTION FOR RELIEF FROM DEFAULT

Daniell contends that the trial court erred by granting Campus's motion for relief from default.

##### A. *Additional Factual and Procedural Background.*

##### 1. *The declaration in support of the motion for relief from default.*

Campus's motion for relief from default was based, in part, on the "attorney fault" provision of Code of Civil Procedure section 473, subdivision (b).

The attorney for Campus submitted a declaration in support of the motion. He had previously filed the first motion, which was purportedly brought on behalf of Riverside, Kayne, and Shelton. In his declaration, he testified that he had intended to file the SLAPP motion on behalf of Campus, as well.<sup>7</sup> At the time, however, his father had just died, and as a result, he had to fly to Boston. Thus, he inadvertently omitted Campus as a moving party.

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<sup>7</sup> Filing a SLAPP motion prevents the entry of default. (Code Civ. Proc., §§ 435, subd. (c), 585, subds. (a), (b), (c), (f).)

As proof, he introduced a copy of the check for appearance fees that he had prepared, in the appropriate amount for four defendants. His process server had crossed out that amount and changed it to the appropriate amount for three defendants. The process server could not reach him by phone, he testified, because he was on the plane to Boston at the time.

2. *The declaration in support of the motion to withdraw.*

While the motion for relief from default was pending, the same attorney filed a motion to withdraw as counsel for Shelton. In his declaration in support of that motion, he stated that Shelton had never actually retained him. He also stated that, when he prepared the first SLAPP motion, “[Shelton’s] name was drafted in the place and instead of the proper party and my client, Campus . . . .”

3. *Daniell’s opposition to the motion for relief from default.*

In opposition to Campus’s motion for relief from default, Daniell argued, among other things, that the attorney’s declaration was not credible because he had contradicted himself about whether he believed that he represented both Shelton *and* Campus or Shelton *instead of* Campus.

4. *The hearing at the motion.*

At the hearing on the motion, Campus’s attorney stated that he had intended to file the motion to strike on behalf of three defendants — namely Riverside, Kayne, and Campus. However, “[w]hen I put the paperwork together, we inadvertently threw in Ms. Shelton’s name and did not throw in Campus.”

Daniell pointed out again that this was contradicted by the fact that the attorney had prepared a check for four defendants.

The trial court granted the motion and ordered the attorney to pay Daniell \$75 in sanctions. It explained: “Look, the reason the law allows this is that really the issue is should we punish defen[dant], Campus . . . , when [its attorney] has come in here and said he made a mistake. So I agree with the law, I don’t think we should. So I will set aside the default. I do believe that there’s an adequate showing of attorney affidavit of fault, and given that, relief’s mandatory.”

B. *Analysis.*

Code of Civil Procedure section 473, subdivision (b), as relevant here, provides: “The court shall, whenever an application for relief . . . is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any . . . resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, . . . unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.”

“The court’s determination of whether the default was caused by the attorney’s mistake, inadvertence, surprise, or neglect is in part a credibility determination.

[Citation.] ‘Credibility is an issue for the fact finder . . . ; we do not reweigh evidence or reassess the credibility of witnesses. [Citation.] . . . When . . . “the evidence gives rise to conflicting reasonable inferences, one of which supports the findings of the trial court, the

trial court's finding is conclusive on appeal. . . ." [Citation.]' [Citation.]" (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 915.)

““Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” [Citation.]” (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1223.) ““To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.” [Citation.] Such cases are rare indeed. [Citation.]' [Citation.]” (*Ibid.*)

Here, Campus's attorney *did* contradict himself under oath. The contradiction, however, went to a wholly irrelevant point. The question before the trial court was whether his failure to list Campus as a moving party in the first SLAPP motion was inadvertent. He was *inconsistent* with respect to whether he thought he represented four clients or only three; however, he *consistently* stated that one of the clients that he thought he represented was Campus and that he intended to file the motion to strike on Campus's behalf. The trial court could reasonably believe this. Hence, it could properly vacate the default.

Daniell, seizing on the trial court's remarks to the effect that relief was mandatory, argues that it failed to consider whether the attorney's declaration was credible. We disagree. It specifically found that the declaration made an "adequate showing." Even in

the absence of such an express finding, we would have to presume that it made all implied findings necessary to its ruling. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148.) By ruling that relief was mandatory, it implicitly found that the declaration was credible.

IV.

DISPOSITION

The judgment and orders appealed from are affirmed. In the interests of justice, each side shall bear its own costs.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI  
Acting P.J.

We concur:

MILLER  
J.

CODRINGTON  
J.